SARAVANAN A NARAYANASAMY

v.

MEENACHEE SUBRAMANIAM

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[DIVORCE PETITION NO: 33-129-1996]
30 DECEMBER 1997

FAMILY LAW: *Divorce - Irretrievable breakdown - Living apart - Law Reform (Marriage and Divorce) Act 1976, ss. 53(1) & 54(1)(d) - Whether professions of love can rebut presumption of irretrievable breakdown in marriage*

The petitioner (husband) and the respondent married in 1976 and lived together until 1986 when they separated. There were two children of the marriage. The petitioner alleged that attempts at reconciliation had failed, that the marriage had irretrievably broken down, and that they had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. The respondent contested the petition.

Held:

[1] The respondent's unilateral profession of continual love for the petitioner was not an answer to the petition, nor could it rebut the fact that the marriage had irretrievably broken down within the meaning of ss. 53(1) and 54(1)(d) of the Law Reform (Marriage and Divorce) Act 1976. No useful purpose could be served by keeping the marriage on paper without any reasonable prospect of maintaining it as a meaningful union in practice.

[Dissolution ordered; decree nisi to be made absolute after three months.]

Case(s) referred to:
Bhanu Sekaramani v. Nagamma [1991] 2 CLJ 1356 ***(refd)***
Cheong Kim Seah v. Lim Poh Choo [1993] 1 SLR ***(refd)***
Grenfell v. Grenfell [1978] 1 All ER 561 ***(refd)***
Lina v. Ngu Chuiong [1994] 2 MLJ 139 ***(refd)***
Moses v. Moses [1968] 1 MLJ 96 ***(foll)***
Tan Keok Yin v. Cheah Saw Hong [1991] 1 CLJ 815 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 53(1), (2), 54(1)(d)

For the petitioner - G Ganesan; GS Mani & Co
For the respondent - Norsiah Bahrin; Biro Bantuan Guaman

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

The petitioner (husband) and the respondent (wife) were married according to Hindu marriage rites at the Chettiar Temple, Jalan Air Terjun, Penang in the month of February 1976. Immediately after the marriage they lived in a rented house, No. 13, Jalan Endah 6/7, Petaling Jaya, until 26 December 1986 when they lived in separate houses.

There were two children of the marriage, *viz* two boys born on 5 October 1977 and 4 November 1982, respectively.

The Petitioner's Petition, Respondent's Answer And Petitioner's Reply

The husband in his petition alleged that the marriage had broken down irretrievably and that the parties to the marriage had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. Attempts at reconciliation between the husband and the wife by the Marriage Tribunal at Petaling Jaya had failed. The husband prayed that custody, care, control and guardianship of the second son be given to him with reasonable access to the wife. He also agreed to maintain the first son until he completes his tertiary education.

The wife in her answer stated, *inter alia,* that the husband had left her in December 1986 without any reason and that she still loves him and so the marriage should not be dissolved. She prayed that the custody, care and control of the second son be given to her with reasonable access to the husband.

The husband in his reply stated, *inter alia,* that the second son came to live with him voluntarily and in view of the son's age, now 16, the son has the ability to decide with whom he wished to stay.

Facts

The marriage at the beginning was normal except squabbles. There were no financial difficulties as the husband was a Division One officer in Federal Agricultural Marketing Authority (FAMA) and she was attached to Radio Television Malaysia (RTM). Sometime in 1983, he signed up for the University of London External Programme LL.B. course, studied on his own and attended crash-course programmes. The family environment was initially good.

Later, the wife agreed to her own niece coming to live with the wife. Her niece studied law full-time and she became a companion to the husband. Both these students got on very well.

During this time, the wife was unhappy as she felt neglected. The husband was in full-swing studying together with her niece. The wife missed everything from her husband as a result of which she asked for more attention from him since the only time they met was after midnight. Meanwhile, the wife as an employee of RTM had irregular working time, from 5am to 3pm and came home after 6pm or 7pm. Before long, their relationship turned sour and serious arguments ensued, culminating in the husband leaving the house on 26 December 1986.

After the husband left, the wife and her relatives appealed to him to come back, but the husband was very reluctant to come back saying that he wanted to study law and not be disturbed.

In 1993, the husband and the wife had gone for a drive a few times, each time of two to three hours duration. They discussed the children's future, husband's future plan and some business projects. The husband and the wife have been living apart since 26 December 1986.

The following chronology of events demonstrate the effort and initiative on the part of this court in giving the parties the opportunity to bring about a reconciliation, but without any significant measure of success.

5.3.1997: The court vacated the date with the advice to the parties to reconcile and fixed 14 March 1997 for hearing.

14.3.1997: The wife's counsel stated that the wife is not agreeable to the dissolution of the marriage. I stood down the hearing for both counsel to discuss with both parties and ascertain whether both parties can come up with an amicable settlement. As both parties were unable to come to terms the hearing started. The husband gave evidence.

1.4.1997: The wife gave evidence.

2.4.1997: The wife continued her evidence. Hearing was adjourned to 17 April 1997.

While giving evidence, the wife broke down emotionally a number of times. As a result, I adjourned the hearing with short breaks. I also called both parties, their children and counsel to chambers with a view to reconcile the marriage. This was not successful.

17.4.1997: Hearing was postponed to 13 May 1997 as the wife's counsel was on medical leave.

13.5.1997: Hearing continued with the wife giving evidence, during which she requested that she be given a final chance to go to the husband's house in Kulim so that she could make the husband live with her. As a measure to reconcile the marriage, I adjourned the hearing. However, there was no reconciliation and I fixed continued hearing for 21 July 1997.

21.7.1997 and 22.7.1997: Hearing continued.

Ground For Divorce

In my judgment, it is clear that the husband finds support in s. 54(1)(d) of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") to establish the ground for divorce *ie*, that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. That being the case, s. 53(2) of the Act requires the court hearing the divorce petition to, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution. The court shall also have regard to one or more of the four facts stated in s. 54(1), which lays down the parameter of what is 'just and reasonable" in the following words:

> In considering whether it would be just and reasonable to make a decree the Court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the Court may think fit to attach, but if it should appear to the Court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

The court in inquiring into the facts alleged as causing or leading to the breakdown of the marriage, may make a decree of dissolution if, but only if, it is satisfied that the circumstances make it just and reasonable to do so. The modern institution of marriage is intended to buttress, rather than to undermine the stability of marriage and when regrettably a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation (See *English Law Commission Report* (Cmnd. 3132 at p. 15), as applied in *Tan Keok Yin v. Cheah Saw Hong* [1991] 1 CLJ 815; [1991] 2 MLJ 267 at 271 F left.

The sole ground upon which a decree of dissolution of marriage may be sought is that the marriage has broken down irretrievably: Section 53(1). In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to the fact that the parties to the marriage have lived apart for a continuous period of two years immediately preceding the presentation of the petition: Section 54(1)(d). This is the sole fact and circumstances relied upon by the husband in para. 9 of his petition.

In *Tan Keok Yin v. Cheah Saw Hong* [1991] 1 CLJ 815; [1991] 2 MLJ 267, 269 right F-H, Lim Beng Choon, J. explained as follows:

> Upon a careful scrutiny of s. 54 of our Law Reform Act there are two striking features of the said section that need to be taken into consideration. Firstly, upon proof on the fact that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, the petitioner has *prima facie* proved that the marriage has irretrievably broken down, if, but only if, the respondent is not contesting it or has no answer as to why the respondent would allow the petitioner to live separately from her or him as the case may be. Secondly, when the respondent is contesting the petition and is able to put up a reasonable answer that notwithstanding the two-year separation the marriage has not irretrievably broken down then the court must, pursuant to sub-s. (2) of the said s. 54, consider all the circumstances including the conduct of the parties and the interests of the children of the marriage before deciding whether the marriage should be dissolved.

(See also *Bhanu Sekaramani v. Nagamma* [1991] 2 CLJ 1356; [1991] 3 MLJ 34, 36C per Lim Beng Choon, J.)

It is eminently clear that s. 53(1) of the Act has succinctly established that there is only one ground for divorce under the Act *ie*, that the marriage has irretrievably broken down: See also *Lina v. Ngu Chuiong [Chong Oi Khium Irene*, co-respondent] [1994] 2 MLJ 139.

Other jurisdiction having identical provisions as our s. 53(1) have established the same ground: See *Cheong Kim Seah v. Lim Poh Choo* [1993] 1 SLR 172 (Singapore) and *Grenfell v. Grenfell* [1978] 1 All ER 561 (England).

Omrod LJ in *Grenfell v. Grenfell* [1978] 1 All ER 561, 566-567 observed as follows:

> There is no point, as I see it, in a case like this, in conducting an enquiry into behaviour merely to satisfy feeling, however genuinely and sincerely held by one or the other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose

> of Parliament was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do should be, in my judgment, firmly discouraged.

The wife asserts that she still loves the husband while she also agrees that she had lived separately for more than ten years from the husband. This assertion does not alter the fact that the marriage has irretrievably broken down and her unilateral love alone does not provide an answer to the divorce petition.

In *Cheong Kim Seah v. Lim Poh Choo* [1993] 1 SLR 172, 184, Karthigesu, J. said:

> A respondent's desire to maintain a marriage when the fact of separation is proved or as in this case is admitted, thus raising the presumption that the marriage has irretrievably broken down cannot in my view be rebutted by professions of love and care and assertions that she provided emotional support throughout the marriage. Nor can it support the statutory defence provided by s. 88(4) of the Charter having regard to the policy and philosophy of legislation already discussed.

On the facts of the case before me, I do not see how any useful purpose can ever be served by keeping the marriage on paper only without any reasonable prospect whatsoever of maintaining the marriage as a meaningful union in practice. It is no more than a facade, an illusory and imaginary bubble of theoretical relationship, devoid of any reality in matrimony. The judgment of Winslow, J. in *Moses v. Moses* [1968] 1 MLJ 96 has a direct bearing on the facts of this case. The learned judge said:

> where the marriage bond has become no more than a detested shackle after the parties have been separated for not less than seven years, it is in the public interest that the tie should be severed.

Conclusion

On the foregoing grounds, I grant an order dissolving the marriage based on the divorce petition herein, the decree nisi to be made absolute three months from the date herein. Each party to bear his/her down costs. Custody of children and other ancillary relief shall be dealt with upon the application by the party concerned.